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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAROL RIDGWAY et al.,

Plaintiffs and Respondents,

v.

JESS DIAZ et al.,

Defendants and Appellants.

D041275

(Super. Ct. No. GIN029125)

APPEAL from an order of the Superior Court of San Diego County, Dana Sabraw, Judge. Affirmed.

Carol Ridgway and Nicholas Barile, Plaintiffs and Respondents (Plaintiffs) filed a complaint to determine the validity of an election held by the architectural committee of their homeowners' association (Costa Serena Architectural Committee; the Committee), seeking an order invalidating the election and ordering a new election to be held. They named as defendants both the Committee and four of its elected directors, who are the

individual appellants here, Jess Diaz, Estelle Hoffman, Elizabeth Szubart and Darlene Wrigley (collectively Appellants).

Following the filing of the election contest action, Appellants filed a special motion to strike the complaint under the anti-SLAPP motion framework. (Code Civ. Proc., § 425.16.)¹ The motion was denied on the basis that this action did not "arise from" protected activity within the meaning of the statutory scheme. Appellants accordingly appeal, contending they are entitled to assert the protection of the anti-SLAPP statutory scheme, and the trial court additionally erred in failing to reach the issue of whether Plaintiffs would be able to show a reasonable probability of success on their election cause of action.

Pending oral argument in this case, the parties brought to our attention that Plaintiffs dismissed the underlying action with prejudice, as to all defendants and all causes of action, and that the trial court set that dismissal aside in an order to show cause proceeding as to these Appellants only. We affirm the underlying order denying the motions and express no opinion on the status of those dismissal proceedings, which are left to the trial court to complete by making any other appropriate orders as required in any further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Committee was created to enforce restrictions contained in the declaration of restrictions for the 700-unit development known as Costa Serena. It is an unincorporated

¹ All further statutory references are to the Code of Civil Procedure unless noted.

association and is not subject to the California provisions regarding common interest developments, as Costa Serena does not have common areas. (Civ. Code, § 1351 et seq.) Its concern has largely been enforcing age restrictions to preserve the development as a senior citizen development. It also deals with building alteration requests, but on a lesser basis.

A dispute arose about the respective jurisdictions of the Committee and a separate community association in the development. Further disputes arose about procedures followed by the Committee for electing its members when vacancies occurred. Plaintiffs Ridgway and Barile sought to run for election, but they were not allowed to be placed on the ballot by the existing Committee. Instead, the four individual defendants ran for office and were elected by homeowners as members of the Committee. The complaint challenges the manner in which the election was held and seeks an order invalidating the election and ordering a new election to be held under court oversight.

The individual defendants (Appellants) filed an answer to the complaint and then filed their special motion to strike the complaint. Plaintiffs filed opposition and extensive declarations were submitted by both sides.² The record does not include any appearance by the defendant Committee itself.

In ruling on the motion, the trial court stated, "Defendants' motion to strike pursuant to Code of Civil Procedure section 425.16 is denied as defendants have not met

² Plaintiffs opposed the motion on the merits without raising any objection to the timeliness of its filing. The trial court appropriately reached the merits and we do likewise.

their burden of demonstrating this action is one 'arising from' protected activity. [¶] Here, after considering the pleadings, and admissible supporting and opposing affidavits, the court concludes the activity forming the basis for plaintiff's cause of action is the manner in which the 2002 architectural committee election was held, not defendants' decision to run for office on that committee. [Citation.]" Because of that threshold determination, the trial court did not decide whether the plaintiffs had shown any probability of prevailing in the action, nor did it grant or deny any fees request.

An appeal was filed. (§ 425.16, subd. (j).) By letter of September 17, 2003, Appellants notified this court that Plaintiffs dismissed the action with prejudice July 21, 2003. The superior court file reveals that this dismissal was set aside as to Appellants pending this appeal. This court proceeded with oral argument and now addresses the merits of the appeal.

DISCUSSION

We first set out the rules of review regarding anti-SLAPP motions, then apply those rules to these arguments in light of the procedural status of this case.

I

A two-step analysis is required when the trial court is requested to rule on a special motion to strike under the anti-SLAPP statutory framework. (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The court is first to determine if the lawsuit falls within the scope of the statute, as arising from protected activity (generally, petitioning or free speech). (*Ibid.*, § 425.16, subd. (b)(1).) The

defendant bears the burden of demonstrating that a cause of action in the lawsuit is one "arising from" protected activity. (§ 425.16, subd. (b)(1).)

The second prong of the statute deals with whether the plaintiff has "demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*Ibid.*)

On review of an order granting or denying such a special motion to strike, the trial court's determinations on the two-pronged statutory criteria are legal questions, and review of the record is de novo. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 473-474 (*Damon*).)

II

In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, the Supreme Court defined the statutory phrase "cause of action . . . arising from" in section 425.16, subdivision (b)(1) as meaning "that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)" (*Ibid.*) Those categories refer to acts "'in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection

with a public issue' [such as] (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Appellants contend the trial court erred in denying their motion, because their candidacy for membership on the Committee should qualify as a protected activity under subdivision 425.16, subdivision (e). They reason that the Committee is similar to a governing body for the development, and candidacy for Committee office is therefore an activity in the free speech arena. (See *Damon, supra*, 85 Cal.App.4th at pp. 475-480.) Plaintiffs respond that Appellants have cited no authority for the proposition that mere candidacy in an election of a private organization is a protected First Amendment activity. They also argue that the status of this particular Committee does not rise to the level of a homeowners' association under common interest development law, such as was considered in *Damon, supra*, because its duties are less extensive and there are no common areas to be governed. (Civ. Code, § 1351 et seq.)

As set forth in *Navellier v. Sletten, supra*, 29 Cal.4th 82, 89, "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from

protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." Here, the trial court did not go beyond the "arises from" analysis, as it concluded that "the activity forming the basis for plaintiff's cause of action is the manner in which the 2002 architectural committee election was held, not defendants' decision to run for office on that committee. [Citation.]" This was a correct reading of the statute, because on this record, Appellants failed to meet their burden of demonstrating that the acts underlying the Plaintiff's cause of action fell within one of the categories of section 425.16, subdivision (e). (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th 69, 78.) Specifically, even though section 425.16, subdivision (e)(4) refers to conduct "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest," the trial court applied this statute by drawing a reasonable distinction between the manner in which the subject election was held, concerning membership on this private committee of limited authority, and the individual Appellants' decisions to participate in that election as candidates, based on their residency in the community. When the matter is viewed in that light, the cause of action against Appellants did not arise from any acts on their parts in furtherance of their rights of petition or free speech. (*City of Cotati v. Cashman* , *supra*, 29 Cal.4th 69, 78.)

Accordingly, the trial court properly did not reach the merits of this action, in terms of whether plaintiffs could show they would probably prevail. (§ 425.16, subd. (b)(1).) Moreover, the record does not show that any attorney fees and costs have yet been awarded under the anti-SLAPP statutory scheme.

Since the only question before us is the statutory interpretation of the "arising from" prong of section 425.16, subdivision (b)(1), and there was no reversible error in that respect, the appropriate action is to affirm the order denying the motion to strike. We need not inquire further into the procedural status of this case (i.e., the dismissal of the complaint and further proceedings pending after that dismissal was set aside as to Appellants), since those matters, if pursued by the parties, would properly be resolved by the trial court upon remand.

DISPOSITION

The order is affirmed. Appellants to bear all costs.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.